U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31284783

Date: JUNE 17, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner is a bioinformatics researcher who seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the record did not establish that the Petitioner had a major, internationally recognized award, nor did he demonstrate that he met at least three of the ten regulatory criteria. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

To qualify under this immigrant classification, the statute requires the filing party demonstrate:

- The foreign national enjoys extraordinary ability in the sciences, arts, education, business, or athletics;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- The foreign national's entry into the United States will substantially benefit the country in the future.

Section 203(b)(1)(A)(i)–(iii) of the Act. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a

one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022).

II. ANALYSIS

The Petitioner earned a Master's of Science in Physics and a PhD in biology majoring biophysics. Following two postdoctoral fellowships, he currently serves as a U.S. government contractor and subject matter expert employed through a contract with a biomedical information technology services company.

Because the Petitioner has not indicated or established that he has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x).

The Petitioner fully presented his claims relating to his prizes or awards and memberships before the Director, but within the appeal, he only makes a passing reference to his eligibility under those criteria utilizing one sentence for each criterion. But more importantly, he does not explain how the Director erred or how his evidence satisfies all of the regulatory requirements. The two criteria at issue here relate to his receipt of lesser nationally or internationally recognized prizes or awards under 8 C.F.R. § 204.5(h)(3)(i), and his membership in associations regulated by 8 C.F.R. § 204.5(h)(3)(ii).

Based on the Petitioner's limited response to the Director's adverse determination under each criterion, he has waived both of these issues in this appeal. *Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) and finding when a filing party mentions an issue without developing an argument, the issue is deemed waived). "A party waives an argument by failing to present it in its opening brief or by failing to develop [its] argument—even if [its] brief takes a passing shot at the issue." *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (alterations in original).

Turning to the Petitioner's appellate arguments relating to his original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field under 8 C.F.R. § 204.5(h)(3)(v), he refers to his patent awards and one letter discussing one of the four U.S. or international patents in which he is named as a co-inventor. Before the Director, the Petitioner did not offer his patents as evidence for the Director to consider as an original contribution of major significance. Instead, he presented them under the awards criterion within the initial filing, or under the leading or critical role criterion in his response to the Director's request for evidence. He cannot

now assert a never before presented claim in the appeal. New assertions advanced for the first time to an administrative appellate body are not properly before us; and this includes previously submitted evidence under a new criterion. *Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021) (refusing to consider an appellant's humanitarian claims that were presented for the first time on appeal). We will therefore not consider his patent claims under this criterion here. As this was the Petitioner's only claim under the contributions criterion on appeal, he has not demonstrated that his evidence meets this criterion's requirements.

Next, regarding the Petitioner's authorship of scholarly articles in the field, in professional or major trade publications or other major media under 8 C.F.R. § 204.5(h)(3)(vi), he provided several of his articles published in professional publications. But, the Director determined that he did not meet the requirements of this criterion. Instead of evaluating whether the publications were professional in nature, the Director focused on the lack of circulation statistics about the journals. Publications in professionally-relevant peer-reviewed journals satisfies this criterion's requirements. 8 C.F.R. § 204.5(h)(3)(iii); *see generally* 6 *USCIS Policy Manual* B.1, https://www.uscis.gov/policymanual. As a result, we conclude the Petitioner has satisfied this criterion's requirements and we withdraw the Director's determination to the contrary.

We conclude that although the Petitioner satisfies the scholarly articles criterion, he does not meet the criteria regarding prizes or awards, membership, or original contributions of major significance. While he argues and submits evidence for one additional criterion on appeal relating to his performance in a leading or critical role at 8 C.F.R. § 204.5(h)(3)(viii), it is unnecessary that we make a decision on this additional ground because he cannot numerically meet the required number of criteria.

As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3), we reserve the remaining issue. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible). It is also unnecessary that we provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119–20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

For the reasons discussed above, the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.